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Supreme Court of the United States

October Term, 1957

No. [redacted] 443

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 23, 1957.

Opinions of the Courts Below

The opinion of the United States District Court for the District of New Jersey (Alfred E. Modarelli, U. S. D. J.), dismissing the libel is reported at 141 F. Supp. 653, is set forth on pages 635a-642a of libelant-appellant's appendix in the Court of Appeals and is also set out in Appendix A to this petition at pages 1a-9a.

The majority opinion of the United States Court of Appeals for the Third Circuit (Chief Judge Biggs and Circuit Judges Goodrich, McLaughlin and Staley) and the minority opinion (Circuit Judges Maris, Kalodner and Hastie) is reported at — F. 2d — and is set out in Appendix B to this petition (pages 10a-26a). The judgment of the United States Court of Appeals is also set forth in Appendix B to this petition (pages 27a-28a).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 23, 1957.

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254(1).

Questions Presented

1. Whether a federal court may engraft concepts of liability peculiar only to the federal maritime law upon the wrongful death act of a state in the absence of any state statutes or authorities incorporating such concepts into that act?

2. Whether a federal court may attribute to the legislature of a state an *in futuro* intent to incorporate into the wrongful death act of that state substantive provisions of the federal maritime law when there is total lack of evidence of such intent on the part of that legislature either at the time of enactment or at any later date?

3. Whether, in any event, a shipowner owes a warranty of seaworthiness to a repairman, employed by an independent contractor, as to an obvious condition aboard the vessel created by a failure of the contractor's equipment, which very equipment he comes aboard to repair?

4. Whether a shipowner is under a duty to provide a safe place to work to a repairman employed by an independent contractor with respect to obvious conditions created aboard the vessel by the failure of the contractor's equipment, when the repairman comes aboard the vessel to repair that equipment with full knowledge of the facts?

5. Whether the widow of a shoreside repairman killed aboard a vessel in state waters may recover for both unseaworthiness and negligence, whereas the widow of a seaman killed under identical circumstances would be limited to a negligence claim only?

The Statute Involved

The libellant sued in the United States District Court for the District of New Jersey to recover damages under the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 through 6, the relevant section of which read as follows:

> "2A:31-1. When Action Lies
>
> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.
>
> • • •

Statement of Facts

The libelant sued in the United States District Court to recover damages under the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1, *et seq.*, for the death of her husband, which occurred aboard m/v Tungus on December 6, 1952, while that vessel was moored at a pier in Bayonne, New Jersey. The District Court entertained the suit under the authority of *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242, 42 S. Ct. 89, 66 L. Ed. 210 (1921) and *Just* v. *Chambers*, 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941).

Taken chronologically, the facts leading up to the suit in the District Court were as follows:

In October, 1952, m/v Tungus, a cargo vessel owned by the respondents, was in the Philippine Islands, where coconut oil in bulk was loaded by the shipper into two deeptanks located in No. 3 shelter deck. The contract for the carriage of this coconut oil specified that the oil was to be discharged at the sole risk and expense of the consignee, who was also obligated to provide all necessary equipment for discharge.

Upon the arrival of the vessel in New York in December, 1952, the respondent impleaded, El Dorado Oil Works, was instructed by the consignee of the oil to discharge the contents of one of the deeptanks into El Dorado's storage facilities in Bayonne, New Jersey. The vessel arrived at El Dorado's pier in Bayonne, New Jersey, in the late afternoon of December 5, 1952.

Subsequently an electric discharging pump owned by El Dorado was lowered into the shelter deck and the El Dorado personnel connected their suction and discharge hoses. The El Dorado pump crew started discharging at about 8 P. M. Shortly after midnight, in the morning of December 6, 1952, one of the officers of the vessel, while making a routine tour of the decks, looked down into the open shelter deck and saw that El Dorado's pump had burst

and that tons of hot, liquid coconut oil were being pumped directly into the shelter deck. None of the El Dorado pump crew were then on board the vessel, although the respondent-impleaded, El Dorado, admitted that one member of its pumping crew was required to maintain a constant watch on the pump.

As a result of the burst coconut oil covered the entire area of No. 3 shelter deck, including the top of the two tank lids. The tank being discharged was partly open, for its oblong cover had been lifted, rotated 90° and then lowered on top of the tank coaming. This had been necessary in order to permit the pump assembly to be lowered into the tank itself, once the distance between the pump and the oil level became too much for the pump. Two El Dorado employees replaced the broken fitting on the pump after having cleaned the spilled oil from around the immediate working area of the pump, but they were unable to regain pumping suction.

Carl Skovgaard, the deceased, a maintenance foreman employed by El Dorado, was called from his home in the middle of the night by the other El Dorado employees on the job. He was told about what had happened, and was asked to come aboard the ship to assist in restarting the pump. Deceased left his home, and shortly later boarded the vessel. Deceased first looked down into the open shelter deck from the main deck and shouted instructions to his pump crew. After several minutes he went down into No. 3 shelter deck to supervise the work.

In moving from the foot of the ladder leading from the main deck to the shelter deck deceased walked through the area over which the oil had been spilled, and as he attempted to step up on top of the tank lid to get to the pump he slipped on the oil spill and fell to his death into the partially opened tank.

Skovgaard, the deceased, had checked the pump on the morning of December 5, 1952, just before the arrival of the

vessel and he was "satisfied that she was in good working condition" (507a). The employees of El Dorado agreed that the pump had failed due to "normal vibration" (480a; 562, 3a). No requests had been made by the deceased or any other El Dorado employee to the officers of the vessel after the oil spill to have the conditions in the No. 3 shelter deck altered or remedied in any way.

The suit came on for trial in the United States District Court for the District of New Jersey before Judge Modarelli in November, 1955. On June 11, 1956 Judge Modarelli filed an opinion holding the respondents not liable for the death of the deceased. After judgment was entered, libelant filed a notice of appeal to the United States Court of Appeals for the Third Circuit.

The appeal was first argued in the United States Court of Appeals for the Third Circuit on February 8, 1957 before Circuit Judges McLaughlin, Staley and Hastie. On June 27, 1957 the Court of Appeals handed down an order calling for reargument of the appeal before the Court *en banc*.

On October 22, 1957 the appeal was reargued before the full bench of seven Judges.

On December 23, 1957 the opinion of the Court was filed and judgment entered. The majority of four, consisting of Chief Judge Biggs and Circuit Judges Goodrich, McLaughlin and Staley called for a reversal of the judgment of the District Court on the grounds that the respondents owed a warranty of seaworthiness to the deceased and were in addition under a duty to provide him with a safe place to work. The dissenting minority of three, consisting of Circuit Judges Maris, Kalodner and Hastie felt that the majority of the Court had injected into the New Jersey Wrongful Death Act liability defining concepts peculiar only to and borrowed from the federal maritime law, and that since the federal maritime law afforded no remedy (the deceased having died in state waters) such borrowing was improper. It was also the opinion of the minority

that under the New Jersey cases the seaworthiness of the vessel could not have been warranted to the deceased and there could have been no breach of duty to the respondents to provide the deceased with a safe place to work, since the danger was obvious to the deceased and since he came aboard to repair and restore to operation the very pump which had caused the oil spill.

Reasons for Granting the Writ

1. The decision of the United States Court of Appeals for the Third Circuit in the instant case is in conflict with decisions of the Supreme Court of the United States such as *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953) and *Kernan* v. *American Dredging Co.*, — U. S. —, No. 34, October Term, 1957, decided February 3, 1958, on the source of a shipowner's liability in terms of unseaworthiness.

The United States Court of Appeals for the Third Circuit, by the majority opinion of December 23, 1957, has held that the right to recover for unseaworthiness is a right conferred by the New Jersey Wrongful Death Act, which by its terms is limited to a right to recover for "wrongful act, neglect or default". In so doing the Court of Appeals, under the guise of interpreting statutory language of New Jersey, has incorporated and given effect to a right having roots only in the federal maritime law. The right is nowhere mentioned in the legislative history of the enactment of the Wrongful Death Act, in the statute or in decisions of the courts of that state.

This Court has held that the right to recover for unseaworthiness derives from the federal maritime law. This Court has also held that unseaworthiness is neither a negligence nor a fault concept. In *Seas Shipping Co.* v. *Sieracki*, *supra*, Mr. Justice Rutledge wrote at 328 U. S. 92 that the idea that the right to recover for unseaworthiness was

a liability founded in negligence was "erroneous", and later, in further defining the nature of unseaworthiness, wrote as follows at page 94:

> "It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing service imposes, the liability is neither limited by conceptions of negligence nor contractual in character".

In *Boudoin* v. *Lykes Bros. S.S. Co. Inc.*, 348 U. S. 336, 339, 75 S. Ct. 73, 99 L. Ed. 642 (1955) Mr. Justice Douglas wrote that if his vessel were not seaworthy an owner was liable "irrespective of any fault on his part."

In *Pope & Talbot, Inc.* v. *Hawn, supra,* an injury case, Mr. Justice Black commented upon the origins of the right to recover for unseaworthiness in the following terms (346 U. S. 409):

> "His right of recovery for unseaworthiness and negligence is rooted in federal maritime law."

In a concurring opinion Mr. Justice Frankfurter wrote at page 415:

> "The right of seamen to recover for unseaworthiness is peculiarly a cause of 'admiralty and maritime jurisdiction', 1 Stat. 73, 77. The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery although it may be relevant in assessing the damages. • • • We should not commingle federal admiralty and state common law and should not engraft onto the federally created right to recover for unseaworthiness a common-law defense foreign to that right".

Most recently in *Kernan* v. *American Dredging Co., supra,* decided by this Court on February 3, 1958, Mr. Justice Brennan wrote:

> "But the remedy for unseaworthiness derives from the general maritime law, and that law recog-

nizes no cause of action for wrongful death whether occasioned by unseaworthiness or by negligence."

2. The decision of the United States Court of Appeals for the Third Circuit, in giving libelant a right to recover based on unseaworthiness, is in conflict with decisions of this Court, such as *The Harrisburg,* 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886), *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921), *Just* v. *Chambers,* 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941), *Garrett* v. *Moore-McCormack,* 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942) and *Levinson* v. *Deupree,* 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953). These cases state the obligation of a federal court to follow the law of the state, whose statute supplies the right to recovery.

On the same issue the decision is in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in *Graham* v. *A. Lusi Ltd.,* 206 F. 2d 223 (C. A. 5, 1953) and *Byrd* v. *Napoleon Avenue Ferry Company,* 125 F. Supp. 573 (E. D. La., 1954), aff'd on opinion below, 227 F. 2d 958 (C. A. 5, 1955), cert. den. 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 601 (1956), and the decision of the United States Court of Appeals for the Sixth Circuit in *Lee* v. *Pure Oil Company,* 218 F. 2d 711 (C. A. 6, 1955).

There is no dispute that the libelant in the instant matter seeks redress for the death of her husband solely under the New Jersey Wrongful Death Act, N. J. S. A. 2A: 31-1, *et seq.,* which is New Jersey's Lord Campbell's Act. Nor is there any dispute that, since the deceased died in navigable waters of New Jersey, the New Jersey Wrongful Death Act provides the sole basis for a recovery by the libelant. It is an established principle that there is no remedy for wrongful death under the general maritime law. *The Harrisburg, supra; Levinson* v. *Deupree, supra; Kernan* v. *American Dredging Co., supra.*

Nor does there appear to be any dispute about the power of a United States Court, sitting in admiralty, to entertain

an action under the wrongful death act of a state for a death, such as occurred in the instant matter. *Western Fuel Co.* v. *Garcia, supra, Just* v. *Chambers, supra.*

The United States Court of Appeals for the Third Circuit has, however, departed from standards established by this Court in that it has applied liability-defining concepts peculiar only to the general maritime law in a case where the sole right is provided by state law. As such it conflicts with numerous rulings of this Court.

In *The Harrisburgh, supra,* this Court ruled as early as 1886 that a United States District Court, in admiralty, which adopts a state statute as a rule of right to be administered within its own jurisdiction, must take that right subject to the limitations which have been established by the state.

That case formed the keystone for the later decision of this Court in *Western Fuel Co.* v. *Garcia, supra,* in 1921, where it was again held that where a libel for damages for wrongful death was filed in the District Court seeking recovery under the laws of California, the District Court was bound to enforce the limitations upon the right, which would have been enforced if the suit had been brought in the courts of that state (257 U. S. 242). The result obtained in the District Court should not vary from that which would obtain if the suit under the State statute had been litigated in the state Court.

This Court again touched on the same subject in 1941 in *Just* v. *Chambers, supra,* when Mr. Chief Justice Hughes recognized the authority of the various states to create rights and liabilities with respect to conduct within their own borders as long as the state action did not run counter to federal laws or the essential features of any exclusive federal jurisdiction. Here again this Court ruled that the end result should be the same as though the suit had been instituted in one of the courts of the State of Florida

rather than in a United States District Court. The United States District Court was bound to give effect to the substantive provisions of the law of Florida.

Both sides of the coin were referred to by this Court in 1942 in *Garrett* v. *Moore-McCormack Co. Inc., supra,* when Mr. Justice Black wrote as follows at 317 U. S. 245:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with a substantive law of the State."

Finally, in 1952 in *Levinson* v. *Deupree, supra,* this Court reiterated the same principle in an action brought in a United States District Court under the wrongful death act of Kentucky. Mr. Justice Frankfurter wrote at 345 U. S. 651:

> "Similarly, when the statute, as it does in this case, vests the right of action in 'the personal representative of the decedent,' it is not for the forum provided by another jurisdiction to vest the right elsewhere: such a forum must look to the local law to determine the meaning of the phrase 'personal representative'."

The foregoing decisions are the logical converse of numerous decisions of this Court to the effect that state courts, which sit upon actions under the federal maritime law, must achieve uniform results across the country, uneffected by local views or local law. This Court has declared the necessity for dominance of admiralty principles in actions in vindication of rights arising under the federal maritime or admiralty law. *Garrett* v. *Moore-McCormack Co., supra, Southern Pacific Co.* v. *Jensen,* 244 U. S. 205,

37 S. Ct. 524, 61 L. Ed. 1086; *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834.

The decision of the United States Court of Appeals for the Third Circuit is in conflict with all of the foregoing in that it has applied federal maritime law in a case where the federal maritime law provides no right to recover. The result achieved by the United States Court of Appeals bears no relation whatsoever to the results achieved by the courts of New Jersey in cases involving the New Jersey Wrongful Death Act.

The decision of the Court of Appeals is in conflict with the decision of the Fifth Circuit in *Graham* v. *A. Lusi Ltd.*, *supra*, an action to recover under the Florida Wrongful Death Act, Title 43, Chapter 768, Section 1, F. S. A. Section 768.01, where Judge Borah wrote at 206 F. 2d 225 that:

> "The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the appellee under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel."

To the same effect is the decision of that Court in *Byrd* v. *Napoleon Avenue Ferry Co.*, *supra*.

In the same vein is the decision of the United States Court of Appeals for the Sixth Circuit in *Lee* v. *Pure Oil Company*, *supra*, an action under the Wrongful Death Act of Tennessee, Title 20 Tennessee Code, Section 607, wherein it has held that the libelant had to take the Tennessee death statute as she found it, irrespective of whether the suit were brought in the District Court or in the state court.

3. The decision of the Court of Appeals which is the subject matter of this petition is also in conflict with these decisions of the United States Courts of Appeals for the

Fifth and Sixth Circuits (*Graham* v. *A. Lusi Ltd., supra,* and *Lee* v. *Pure Oil Company, supra*), on the interpretation of the liability defining concept known as "unseaworthiness".

In ruling upon wrongful death acts of other states having similar language, the United States Courts of Appeals for the Fifth and Sixth Circuits have held that no right to recovery for unseaworthiness was given by those state statutes.

Graham v. *A. Lusi Ltd., supra,* was a suit brought to recover under the Florida Wrongful Death Act, Title 43, Chapter 768, § 768.01 F. S. A., where the right to recover is predicated upon the "wrongful act, negligence, carelessness or default of any individual or individuals * * * (or by the wrongful act, negligence, carelessness or default of any ship, vessel, boat or persons employed thereon), * * * ". Judge Borah held at 206 F. 2d 225 that the trial court was correct in holding that unseaworthiness without negligence would not afford the libelant a cause of action.

In *Lee* v. *Pure Oil Company, supra,* the United States Court of Appeals for the Sixth Circuit passed upon an action under the Tennessee Death Statute, Title 20, § 607 of the Tennessee Code, which uses the words "wrongful act, omission, or killing by another". Upon the trial in the District Court the plaintiff unsuccessfully attempted to amend the complaint so as to allege a cause of action based upon unseaworthiness. The Court of Appeals for the Sixth Circuit affirmed the Trial Court's rejection of the request for a charge on unseaworthiness and held that the right conferred by the Tennessee Death Statute was to recover only in the event of negligence 218 F. 2d 718.

The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit in the instant matter recognized the conflict.

The majority opinion of the United States Court of Appeals for the Second Circuit's decision in *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, — F. 2d —, C. A. 2, No. 94, October Term, 1957, decided January 10, 1958, a copy of which opinion is annexed to this petition as Appendix C, recognized the conflict, as well, but was "not persuaded".[1] The *Halecki* case cites *Skovgaard* as authority for the proposition that unseaworthiness is a basis for recovery under the New Jersey Wrongful Death Act, and then goes even further by applying the federal maritime law rule of comparative negligence, even though the New Jersey Courts have held that contributory negligence of the deceased in an action under the Wrongful Death Act is a total bar to recovery.

4. This decision of the United States Court of Appeals for the Third Circuit is in conflict with decisions of the Courts of the State of New Jersey, not only on the question of the scope of the liability under the New Jersey Wrongful Death Act, but also on the question of the liability of an owner for conditions on his premises as to which the invitee was fully cognizant.

The "interpretation" of the New Jersey Wrongful Death Act, holding that the words "wrongful act, neglect or default" are synonomous with "unseaworthiness" is an exercise of judicial legislation by the federal court which finds no basis in the statutes or the decisions of the Courts of the State of New Jersey. No specific authority for such an interpretation was found by the Court. Significantly, the majority bench in the United States Court of Appeals for the Second Circuit in *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, *supra*, likewise found no authoritative basis

[1] Counsel for petitioners has been informed by counsel for the defendants in the *Halecki* case that it is their intention to file a petition for a Writ of Certiorari in the Supreme Court of the United States, which petition would be due in the second week of April, 1958.

for such a holding in the decisions of the Courts of the State of New Jersey. The only excuse for the interpretation is the alleged need for a "liberal construction" of the act, since the professed aim of the act was "to abolish a harsh and technical rule of the common law". No case in the New Jersey Courts has been found in which liability under the New Jersey Wrongful Death Act was predicated upon a warranty or a condition not necessarily attended by any act of omission or commission. The warranty of unseaworthiness is a unique characteristic of the federal maritime law. As has been stated by this Court in decisions cited earlier in this petition, negligence plays no part in the right to recover for unseaworthiness.

In *Hagerty* v. *Central R. R. Co.*, 31 N. J. L. 349, 350 (1865), a leading case in New Jersey on its Wrongful Death Act, and one cited in the *Skovgaard* opinion, the Chief Justice referred to the "wrongful act, neglect or default" in the Act as imposing a general liability for what was described by him as "misfeasance". In *Kuzmiak* v. *Brookchester, Inc.*, 33 N. J. Sup. 575, 588, 111 A. 2d 425 (1955), the New Jersey Superior Court, Appellate Division, stated that:

> "'active wrongdoing', 'affirmative negligence' and 'misfeasance' have the same essential connotation; and, in short, may be said to be negligent acts of commission."

In the face of a total lack of evidence of intent, the United States Court of Appeals for the Third Circuit has ascribed to the legislature of the State of New Jersey an intention to include the right to recover for unseaworthiness in the right to recover for a "wrongful act, neglect or default", even though the New Jersey Act with the original words "wrongful act, neglect or default" was enacted on March 3, 1848, when persons in the category of this deceased were most certainly not entitled, even under the then rulings of our federal courts, to a warranty of seaworthiness.

As suggested by the dissenting opinion of Circuit Judge Hastie in the instant matter, only bedlam will result if we are to ascribe to a state legislature an intention to incorporate future interpretations given to federal maritime law by our admiralty courts. The decision of the United States Court of Appeals for the Third Circuit in the instant matter is wholly unsupported by the law of the state of New Jersey in a situation where the laws of the State of New Jersey provide the sole right to recovery.

The end result achieved by the Court of Appeals is rather startling in another respect. Skovgaard, we are told, would have been entitled to a warranty of seaworthiness if he had only been injured, because he was doing work formerly done by seamen. *Seas Shipping Co.* v. *Sieracki, supra.* But by this curious decision the Court of Appeals has given to the widow of Skovgaard rights far greater than the rights of the widow of a deceased seaman. This Court has held that the widow of a seaman killed in the waters of a state is limited to a negligence cause of action under the Jones Act (46 U. S. Code Section 688), and cannot recover for unseaworthiness under the federal maritime law or even under a state death act. *Lindgren* v. *United States,* 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686 (1930). If Skovgaard's right to recover for unseaworthiness *derives* from the rights of seamen, we fail to see why the rights of his widow should exceed the rights of the widow of a seaman killed under the same circumstances.

5. The holding of the United States Court of Appeals in the instant case flies directly in the teeth of decisions of the courts of New Jersey, which hold that no duty is owed by the owner of the premises to an invitee with respect to a dangerous or defective condition when the invitee has full knowledge of the defect. Furthermore the New Jersey Courts have held that one who engages an independent contractor is under no duty to guard the employees

of that independent contractor against the very dangers which arise from the nature of their work.

In *Broecker, Admx.* v. *Armstrong Cork Company,* 128 N. J. L. 3, 24 A. 2d 194 (1942) an action was brought to recover damages for the death of plaintiff's decedent who had been killed as a result of a fall from a defective roof, which the decedent, as an employee of a roofing company was engaged in replacing. Non-suit was granted by the presiding Judge in the Supreme Court, and he was affirmed by the Court of Errors and Appeals in a unanimous opinion delivered by Judge Case. Judge Case held that defendant was under no duty to provide the deceased with a safe place in which to work. He wrote:

> "Before recovery may be had a duty must exist in point of law and a failure in that duty must be proved in point of fact. It is hard to see how the person who engages an independent contractor is under any duty to guard the servants of the latter against the very danger that arises from their work."

The record shows that the deceased was responsible for checking the condition of the pump before the job was started, the failure of the pump and the resulting oil spill were the responsibility of the deceased. Deceased was a maintenance man for an oil company. Pumps and oil were his bread and butter.

In *Mergel* v. *Colgate-Palmolive-Peet Co.,* 41 N. J. Super. 372, 125 A. 2d 292 (1956), the Superior Court cited with approval the foregoing language from the *Broecker* opinion, and added at page 379:

> "It has long been the law of the State that an employee assumes all those risks which are ordinarily incidental to his employment as well as those dangers which are plain and obvious to a person of ordinary understanding and judgment [citations]".

In the instant matter the record shows beyond question that the oil spill created by El Dorado's pump in the 'tween

deck of m/v Tungus was apparent and obvious and known to the decedent. Under such conditions the Courts of New Jersey would deny recovery to this libelant. No different result should obtain because the forum was a federal court and not one of the courts of the State of New Jersey.

In further support of the stand taken by the Courts of the State of New Jersey on this point we refer to the decision of the Supreme Court of the State of New Jersey in *Lokar* v. *Church of the Sacred Heart*, 24 N. J. 549, 133 A. 2d 12 (1957). At page 553 the Court held:

> "The possessor of land is not liable to one rightfully on the premises for injuries attributable to dangers that are obvious or as well known to the user of the lands as to the possessor."

Again, we have the case of *Newbury* v. *American Stores Co.*, 115 N. J. L. 604, 180 Atl. 875 (1935), a decision of the Court of Errors and Appeals of the State of New Jersey referred to by Judge Hastie in his dissenting opinion in the instant matter. In ruling on the obligation of the owner of premises to invitees for defective conditions of the premises the Court of Errors and Appeals wrote:

> "It is axiomatic that the rule that one who enters a store premises by invitation may lawfully assume that the proprietor has performed his duty to render the premises reasonably safe, is not applicable where the invitee knows the contrary to be the case."

The foregoing decisions should be binding in this case.

Under the facts of this case it is an anomaly to say that the owner of m/v Tungus warranted the seaworthiness of the 'tween deck of m/v Tungus with respect to the oil spill to the deceased, when the deceased himself was fully aware of the oil spill. The responsibility for the maintenance of that pump rested with the deceased himself. It defies logic to say that under the circumstances of this case the shipowner was under a duty to provide the deceased with a safe place to work, when the very reason

for the presence of the deceased aboard the vessel was that his pump had failed and in failing had created the oil spill which caused his death.

6. The decision of the United States Court of Appeals for the Third Circuit in the instant case has raised questions of importance as to the extent to which a United States Court, sitting on a case where recovery can be had only under state statute, may ignore the specific rulings of the courts of that state on the issues, and as to the extent to which that court may incorporate into the state's wrongful death act concepts which are alien to the state act and state authorities.

This decision of the United States Court of Appeals of the Third Circuit has aready led one of our Courts of Appeals to go even further astray in "borrowing" general maritime law concepts in passing upon an action under the Wrongful Death Act of New Jersey. The United States Court of Appeals for the Second Circuit in *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association, supra,* has held in a similar case tried in the District Court under the New Jersey Wrongful Death Act, that the contributory negligence of the deceased resulted only in a mitigation of the damages, in accordance with the substantive provisions of the general maritime law, whereas the New Jersey Courts have held that contributory negligence of the deceased under that Wrongful Death Act constitutes a total bar.[2] We have here flagrant examples of United States Court deciding cases

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[2] As noted in this petition, it is the intention of counsel for the defendants in the *Halecki* case to file a petition for a Writ of Certiorari in this Court, which petition we understand is due in the second week in April, 1958. Since the points at issue are so similar, and since the same counsel represents the libelant-respondent and the plaintiff-respondent in the *Skovgaard* and *Halecki* cases, respectively, we suggest that it might be appropriate to defer a ruling on the instant petition pending receipt of the petition and the opposing brief in the *Halecki* matter.

governed by state law in a way completely at odds with the way they would have been decided in the state courts.

Such a trend frustrates the continued efforts of this Court to bring about uniformity of result in our state and federal courts. If the right is established by the federal maritime law, then the results should be the same whether tried in the state court or the federal court. To the same extent, where the sole right is under state law, the end result and the standards applied should be the same irrespective of the forum, and the federal courts must be prepared to follow relevant state decisions.

This decision of the majority of the United States Court of Appeals for the Third Circuit, which is the subject of this petition, constitutes a dangerous departure from the principles which have guided our Courts in the handling of cases in our federal courts, where the right derives solely from a state statute, and in which, heretofore, our federal courts have been admonished to apply the substantive law just as though the action had been brought in one of the courts of that state.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated, New York, N. Y., March 21, 1958.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Petitioners,
80 Broad Street,
New York 4, N. Y.

DAVID P. H. WATSON,
of Counsel.

Appendix A

(Opinion of Modarelli, D. J.)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 12-55

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of CARL E. SKOVGAARD, deceased,

Libelant,

—v.—

The vessel m/v TUNGUS, her boilers, etc., and DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, et al.,

Respondents,

and

EL DORADO OIL WORKS,

Respondent-Impleaded.

Appearances:

BAKER, GARBER & CHAZEN, Esqs., Proctors for Libelant; By: NATHAN BAKER, Esq.

MCALEER, CONNELL & CORRIDAN, Esqs., Proctors for Respondents.

HAIGHT, GARDNER, POOR & HAVENS, Esqs. (N. Y. Bar); By: J. WARD O'NEILL, Esq. and DAVID P. H. WATSON, Esq., Of Counsel.

WILBUR A. STEVENS, Esq., Proctor for Respondent-Impleaded.

KIRLIN, CAMPBELL & KEATING, Esqs. (N. Y. Bar); By: JOSEPH M. CUNNINGHAM, Esq., Of Counsel.

MODARELLI, *District Judge*:

In October, 1952, at a foreign port, coconut oil was loaded into the two deep tanks of No. 3 shelter deck of the

respondent cargo vessel m/v Tungus. On December 5, 1952, at 5:30 p.m., she docked at a Bayonne, New Jersey, pier. The owner of the oil in the port deep tank having arranged with respondent-impleaded, El Dorado Oil Works to discharge and store the oil, cargo surveyors and El Dorado workers went aboard to prepare for the discharge of the oil from the port tank.

Under the supervision of the El Dorado workers, two of the ship's crew operated winches; they were aided by one officer of the ship; the port deep tank lid was lifted, rotated 90°, and lowered to a position across the top of its coamings so that the after third of the tank was open. The El Dorado workers were satisfied with the position of the tank lid. A pump, owned by El Dorado, was lifted by the ship's winches and lowered into No. 3 shelter deck and placed on top of the port deep tank lid under directions of an El Dorado worker; he also directed the rigging of the suction and discharge hoses. Two hatch beams were lying side by side between the port and starboard deep tank coamings; the beams were used when dry cargo was carried in the tanks. The location of the beams was the normal storage place during the hauling of liquid cargo. The testimony of Wagner, who was employed by El Dorado as a maintenance machinist describes the condition of the pump prior to its use:

> "A. I received—that morning I received orders from my supervisor, Mr. Skovgaard, [his death is the basis of this action] to repair the pump, check it, because the ship is coming in later that day. I went down to where it was, in the mill building below the machine shop, and I went through my routine inspection, re-aligned the gears, and I told Carl [Skovgaard] what else I can do.
>
> He told me it would be a good idea to go ahead. I put four pins in the legs of the pump to secure it to

the base so she don't shift on us. I also put new packing in, in the glands and new fins inside the pump.

Q. New what? A. Fins, blades that bring up the oil.

Q. After you were finished with this inspection and repair of the pump, what did you do? A. I called it to the attention of Mr. Skovgaard. We both went over it. We turned it by hand to make sure it is workable, and everything, and we were both satisfied that she was in good working condition.

* * *

Q. But when you and Carl Skovgaard were finished inspecting the pump, and you were both convinced that it was working properly? A. Yes, sir.

Q. —what did you do with it then, did you put it on the pier to await the arrival of the ship? A. Yes. They took it on what they call a stringpiece, or something, on the side of the pier and put it there." (Transcript, pp. 542-543.)

At 8:05 p.m., December 5, 1952, El Dorado's workers began to discharge the oil from the tank of the m/v Tungus. Attached to the pump was an air injection nipple, which was not an integral part of the pump but was made by El Dorado workers out of parts in stock and then attached to the pump. The ship's log book entry for December 6 describes the next event, which occurred at 12:15 a.m.:

"At 0015 the oil connection burst where the steam pipeline is screwed on to same, becoming leaky. The leakage was detected by the ship's 3rd Officer who was on watch. The 3rd Officer tried immediately to call men from the pump crew, but it was found that none of the pump crew was on board. Before the 3rd Officer had succeeded in getting hold of the men

which were down on the dock the connection was broken off and the coconut oil gushed out into the starboard side of the shelter deck and down through the hatch covers in the forward part of the tank into the No. 3 lower hold. The pump was stopped immediately as the men came on board. The oil, however, continued to pass through the leaky place as the oil was running back through the oil hose. However, one succeeded in stopping the leakage by inserting a plug, but not before several tons of oil had run into the deck and lower hold.

The oil stained about 50 paper bags desiccated coconut bound for Boston stowed in the starboard side of the shelter deck.

The oil ran underneath mahogany lumber which was stowed in the after part of the shelter deck in No. 3. It continued through the shelter deck into No. 4 under bales of rugs which were stowed there. In the lower hold No. 3 are stowed steel plates, scrap brass metal and mahogany lumber."

As a result of the oil spill, liquid coconut oil covered the entire area surrounding the pumping operation, including the top of both tank lids, the area forward of the tank coamings and between the port and starboard tank coamings. After the pump had been stopped the chief officer of the ship and the cargo surveyors went into the shelter deck to ascertain the extent of the cargo damage. Donohue and Russo, El Dorado employees, then replaced the broken fitting on the pump after "squeegeeing" * the spilled oil from a working area sufficient to repair the pump. The deceased Skovgaard, a maintenance foreman employed by El Dorado, was called from his home to assist in repairing

* Done by the use of a squeezeable mop.

the pump and restoring it to operation. At 1:25 a.m., he boarded the vessel. Since Donohue and Russo still were working on the disabled pump, he went down into No. 3 shelter deck to assist them. In moving from the foot of the ladder leading down from the main deck to the shelter deck, Skovgaard walked through the area over which the oil had spilled. As he walked aft of the port tank, he stepped on either one or both of the hatch beams; then as he attempted to step onto the top of the tank he slipped on the spilled oil and fell to his death into 8 feet of hot oil contained in the hatch opening of the port tank.

Libelant argues that she has two separate causes of action: One, under the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 et seq., for negligence and the other under the general maritime law of unseaworthiness. The question already has been decided. In *Levinson* v. *Deupree*, 345 U. S. 648, 650 (1953), the Court held that "The maritime law does not allow recovery for wrongful death. *The Harrisburg*, 119 U. S. 199; *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 555. In 1920, Congress adopted a Lord Campbell's Act restricted to deaths on the high seas, 41 Stat. 537 et seq., 46 U. S. C. § 761 et seq. * * *." In *Just* v. *Chambers*, 312 U. S. 383, 388, 389 (1941), " * * * this Court, upon an elaborate review of the decisions, concluded that no suit for wrongful death would lie 'in the courts of the United States under the general maritime law.' *The Harrisburg*, 119 U. S. 199, 213. See, also, *The Consair*, 145 U. S. 335, 344. The absence of a federal or state statute giving a right of action was emphasized. But when a State, acting within its province, has created liability for wrongful death, the admiralty will enforce it." Further, at page 391, the Court said: " * * * The pith of the matter is that the maritime law, as we conceived it, did not permit recovery, [in the case of wrongful death] and in the same sense * * *." The Court of Appeals for this

Circuit also has spoken; in *Klingsciesen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (C. A. 3 1939): "* * * In the case at bar, we may not apply the familiar rule of admiralty where contributory negligence serves to divide the damages. It is settled that no suit may be brought to recover damages for death in an admiralty court of the United States under general maritime law. Such a right exists solely by statute. The appellant has based her suit upon a statute of Pennsylvania. * * *"

Thus it is clear that libellant's recovery, if any, is under the New Jersey Death Act, N. J. S. A. 2A:31-1.

Incidentally, the respondent and respondent-impleaded both refer to a proceeding instituted by the libelant in the New Jersey Department of Labor and Industry, Division of Workmen's Compensation, Hudson County District, in which the then respondent, El Dorado Oil Works, questioned the jurisdiction of the New Jersey Compensation Bureau, alleging that jurisdiction was under the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. § 903 et seq. In his decision, Deputy Director Lorenz held that the New Jersey Department of Labor and Industry, Division of Workmen's Compensation, had jurisdiction over the petition seeking compensation for the death of Carl E. Skovgaard, holding "that, being in the twilight zone, the decedent, *not being connected in any way with the operation of the ship,* I find comes under the protection of this Division." (Emphasis supplied.) A compensation award was accordingly made for the payment to the widow, libelant herein, until May 12, 1969, at which time the youngest child of the decedent will reach the age of 18.

The libelant alleges that respondent's negligence consisted of: (1) Allowing the port tank to remain partly open without placing ropes or other barriers around it, (2) inadequate lighting in the shelter deck, (3) placing iron beams in the walking space between the two tanks, (4) leav-

ing oil on the deck, tank lid, beams, and in the walkway between the tanks near an open, unguarded tank.

As to (1), there was no negligence in allowing the tank to remain open as part of the cargo unloading operation. The tank opening was necessary to discharge the oil. See *Long* v. *Silver Line, Ltd.*, 48 F. 2d 15 (C. C. A. 2 1931); *The Kongosan Maru*, 292 F. 801, 803, 804 (C. C. A. 9 1923); *The Louisiana*, 74 F. 748, 750, 751 (C. C. A. 5 1896).

As to (2), on the night of Skovgaard's death there were four permanent deck lights forward and aft of the hatch, and two reflectors with 500 ampere bulbs immediately after the hatch; there were also four regular cargo lights shining directly into No. 3 shelter deck. Additionally, the lighting in the hatch was adequate for two surveyors to make their calculations and for Donohue and Russo to replace the sheared-off air injection nipple.

As to (3), libelant cites only *Cooney* v. *United States*, 74 F. Supp. 26 (W. D. Wash. 1946). In that case, hatch boards had been piled or loosely thrown on deck, causing the ship's deck engineer to fall when he stepped on the pile while he was walking along the deck. The court concluded that there had been a negligent piling of the boards. The case does not hold that the mere presence of boards is negligence but only that an improper piling of boards is a negligent condition. Here, there is no proof that the iron beams were unfit to walk upon, aside from the fact that they were covered with oil, which will be discussed. Moreover, the facts are inconsistent with the theory that the presence of the beams caused Skovgaard to fall into the tank. His fall was caused by slipping when he had at least one foot already on the lid.

As to (4), the issue correctly is stated by respondent: Whether during the repair operations it was the vessel's duty to the deceased to clean up the oil spill. Respondent forcefully contends that "Not a single authority has been cited by proctor for libellant which spells out a duty on

the part of the vessel to clean up an oil spill caused by the very parties whose sole duty and function it was to discharge the oil properly, and whose employee it is who is now attempting to recover." The court agrees. In support of her proposition that it was the vessel's duty to clean up the oil spill, libelant cites *Anderson* v. *Lorentzen*, 160 F. 2d 173 (C. A. 2 1947); *Fodera* v. *Booth American Shipping Corporation*, 159 F. 2d 795 (C. A. 2 1947); *Santamaria* v. *Lamport & Holt Line, Ltd.*, 119 N. J. L. 467 (E. & A. 1938); *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314 (1952). None of those cases aid libelant. The negligence of the vessel in the *Anderson* case was in its failure to warn a longshoreman of the dangerous nature of the cargo. Here, however, the dangerous oil spill was known to Skovgaard. In *Fodera*, the negligence clearly was that of the shipowner and not, as here, that of the injured party's fellow employees. *Santamaria* does not hold that a shipowner is liable to a worker for a condition created by his fellow employees. Moreover, under New Jersey law when the employee of an independent contractor enters property at the instance of the owner to correct the precise condition which later causes the employee's injuries, the owner is not liable unless he supervised or controlled the employee. *Broecker* v. *Armstrong Cork Co.*, 128 N. J. L. 3 (E. & A. 1942). Here, Skovgaard boarded the vessel to help repair the defect and restore to operation the pump which caused the oil spill. The entire repair operation was conducted by El Dorado, and there is no evidence from which to infer that any m/v Tungus personnel supervised or controlled either the discharge of the oil from the tank or the repair of the pump. In McFall, the court held that a longshoreman who is employed by an independent contractor engaged by the owner to load its ship, is an invitee aboard the vessel. "As such he is entitled to a reasonably safe place to work. The duty of exercising reasonable diligence to provide such a place and warn the longshore-

men of hidden dangers devolves upon the owner of the ship * * *." Page 324. Here, however, the independent contractor El Dorado was engaged by the owner of the cargo who was not the owner of the ship.

I am not persuaded that the owner of the vessel is under any duty to protect the workmen of the independent contractor, El Dorado Oil Works, engaged by the owners of the cargo of coconut oil, against the dangerous conditions created by the very work for which the independent contractor was hired. Accordingly, the court finds that the respondents are not liable for Skovgaard's unfortunate death and the libel must be dismissed.

The foregoing opinion shall constitute findings of fact and conclusions of law, as required by Rule 52.

An order may be submitted in conformity with the opinion herein expressed.

Appendix B

(Opinion of Staley, C. J. and Dissenting Opinion of Hastie, C. J.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,025

No. 12,031

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of CARL E. SKOVGAARD, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of CARL E. SKOVGAARD, deceased,

Libellant-Appellant,

against

The Vessel M/V TUNGUS, her boilers, etc., and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, et al.,

Respondents-Appellants,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Reargued October 22, 1957

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed December 23, 1957)

By STALEY, *Circuit Judge*.

This admiralty appeal urges upon us the contention that the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-

1, is broad enough to encompass an action for death based upon a breach of the warranty of seaworthiness.

Carl E. Skovgaard met his death by suffocation and shock when he slipped and fell into a tank of heated coconut oil aboard the M/V *Tungus*. On December 5, 1952, the *Tungus*, with a cargo of coconut oil, was docked at a pier in navigable waters at Bayonne, New Jersey. The respondent-impleaded El Dorado Oil Works agreed with the owners of the oil cargo in the port deep tank to discharge the oil from the vessel and to store it. Employees of El Dorado began to discharge the oil from the tank around 8:00 p. m. of December 5, 1952. Two officers and two crew members of the *Tungus* remained aboard on duty; the latter two were specifically assigned to assist El Dorado in the discharge operations. The pump owned by El Dorado and used in the operation was apparently in good working order until around 12:15 a. m., December 6. It was then that an air injection nipple burst, causing tons of hot coconut oil to be pumped directly onto the shelter deck of the *Tungus*. It was the crew of the vessel that first discovered the leak and took temporary steps to stop it.

The deceased Skovgaard was a maintenance foreman of El Dorado. He was called from his home shortly after the leak developed to assist in repairing the pump. He arrived on board around 1:25 a. m. As Skovgaard walked aft of the port tank, he stepped on the hatch beams and then attempted to step onto the top of the tank. He slipped on the spill and fell to his death in the hot oil.

The suit was brought by Olga Skovgaard, administratrix of the estate of the deceased. Her libel pleads principally two causes of action, one predicated on unseaworthiness, the other on negligence. Both of these causes of action were based upon the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1. After trial was held, the district court dismissed the libel, deciding that an action for death by unseaworthiness did not lie *in the general maritime law*, and as to the negligence question, that the vessel owed no duty to the deceased to clean up the oil spill. 141 F. Supp.

653 (D. C. N. J. 1956). The impleading petition against El Dorado was dismissed; respondent took a precautionary appeal from this action.

It is an established principle of maritime law that in the absence of statute there is no remedy for wrongful death. The Harrisburg, 119 U. S. 199 (1886); Levinson v. Deupree, 345 U. S. 648, 650 (1953). "Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land."—Justice Cardozo in Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 371 (1932). In an effort to obviate a plain inequity, Congress in 1920 enacted the Death on the High Seas Act, 46 U. S. C. § 761 et seq., which provided a remedy in admiralty for death occurring more than a marine league from shore. This statute, of course, does not apply to death occurring on territorial waters. Nonetheless, when death occurs on navigable waters within a state whose statutes have created a cause of action for death by wrongful act, admiralty courts will entertain such an action by permitting the state statute to supplement the general maritime law. Western Fuel Co. v. Garcia, 257 U. S. 233 (1921); Just v. Chambers, 312 U. S. 383, 388 (1941).

It follows that whatever right appellant has in seeking redress for the death of Skovgaard must be based upon the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1, which reads as follows:

> "When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime."

Appellant urges that unseaworthiness is a "wrongful act, neglect or default" within the meaning of the New Jersey Act.

We are of the opinion that the district court misconceived the nature of the first cause of action as a death action under general maritime law. It was in fact brought specifically under the New Jersey death act.

In the determination of whether unseaworthiness is such a "wrongful act, neglect or default" as will admit of recovery, we must look to the construction given to the Act by the New Jersey courts. They have held that the Act is in the highest sense remedial, and is entitled to a liberal construction, for its aim was to abolish a harsh and technical rule of the common law. Haggerty v. Central Railroad Co., 31 N. J. L. 349 (1865); Cibulla v. Pennsylvania-Reading Seashore Lines, 25 N. J. Misc. 98, 50 A. 2d 461 (1946).

The nature of the conduct which will create liability under the New Jersey statute is of crucial importance. The legislature describes it as "wrongful act, neglect or default." It is presumed that the legislature did not employ useless verbiage and that each word has independent meaning. Ford Motor Co. v. New Jersey Department of Labor and Industry, 5 N. J. 494, 76 A. 2d 256, 260 (1950); 82 C. J. S. Statutes § 316 at pages 551-552 (1953). The conduct required to impose liability, therefore, is not limited to that conduct embraced in the historical concept of negligence. The words encompass something more. See, e.g., The H. S., Inc., No. 72, 130 F. 2d 341 (C. A. 3, 1942); Judson v. Peoples Bank and Trust Co. of Westfield, 17 N. J. 67, 110 A. 2d 24, 35-36 (1954).

It is urged that since unseaworthiness is spoken of as a species of liability without fault, it cannot be a "wrongful act, neglect or default" within the meaning of the statute. However, the characterization of unseaworthiness as liability without fault is dangerously deceptive. For urgent and sound reasons of public policy, the law has imposed the

absolute duty upon the shipowner to provide a seaworthy vessel, and liability results only as a consequence of the breach of that duty. If "fault" means negligence alone, of course no fault is required, and to that extent only, the phrase "liability without fault" is accurate. But to say that one who breaches a duty is without fault is a logical as well as a legal incongruity.

The seaman possesses the legal right of a seaworthy ship. Whenever this legal right is infringed and harm results by reason of the ship being unseaworthy, a "wrong" occurs, whether it be of omission or commission. The Supreme Court of New Jersey has defined "wrongful act" as "any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right." Louis Schlesinger Co. v. Rice, 4 N. J. 169, 72 A. D. 197, 203 (1950). Culpability is not necessary to constitute a wrong. It is the liability-creating quality of an act which makes it wrongful.

If it be said that the New Jersey act provides redress for tortious conduct alone, we answer that providing an unseaworthy ship is a tort. As was said in Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555, 558 (C. A. 2, 1950):

> "It would follow from that analysis that the breach of the 'obligation' to furnish a seaworthy ship is a tort; and that is a result consonant with the historical attitude towards breaches of warranty, which until 1778 had to be sued in tort, and which may still be so treated if the distinction is important."

The New York Court of Appeals has decided in a food poisoning case that the breach of the warranty of fitness for human consumption, imposed by law upon considerations similar to the imposition of the warranty of unseaworthiness, is a "wrongful act, neglect or default" within the

New York wrongful death statute. Greco v. S. S. Kresge Co., 277 N. Y. 26, 12 N. E. 2d 557 (1938).

The New Jersey statute further refers to the "wrongful act, neglect or default" as one "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury." This language may admit of alternative interpretation. It may be construed as defining the nature of the "wrongful act, neglect or default"—i.e., if the conduct would have been actionable by the decedent had he lived, by virtue of that very fact his named beneficiaries would have an action in the event of his death. Or the clause may be construed as a limitation or an additional requirement—i.e., the conduct upon which the suit is based must be such that decedent could have sued had he lived, in addition to being a "wrongful act, neglect or default." In either interpretation, the statutory requirements are met by plaintiff here, for if Skovgaard had merely been injured he could have maintained an action against the vessel on the theory of unseaworthiness, since he was one "within the range of its humanitarian policy." Seas Shipping Co. v. Sieracki, 328 U. S. 85, 95 (1946).

We hold that the failure to provide a seaworthy vessel in the case before us is such "wrongful act, neglect or default" as will allow recovery under the New Jersey wrongful death statute.[1]

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[1] It is interesting to note that this court has several times held in the determination of the question of laches in an action for personal injuries based upon unseaworthiness that the analogous statute of limitations to be applied is the Pennsylvania two-year statute which uses language substantially similar to the New Jersey Wrongful Death Act. The time limitation is imposed in actions for injury "wrongfully done to the person." Act of June 24, 1895, P. L. 336, § 2, 12 Purdon's Pa. Stat. Ann. § 34. See Kane v. Union of Soviet Specialist Republics, 189 F. 2d 303 (C. A. 3, 1951), cert. denied, 342 U. S. 903 (1952), and Taylor v. Crain, 195 F. 2d 163 (C. A. 3, 1952).

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The same conclusion was reached by Judge Learned Hand in his dissenting opinion [2] in Gill v. United States, 184 F. 2d 49, 57 (C. A. 2, 1950):

> "* * * Is a vessel owner liable for a seaman's—or a longshoreman's—death within the territorial waters of a state when it is caused by the unseaworthiness of the vessel? *I have no doubt that the death was owing to the respondent's 'wrongful act, neglect or default,' as the New Jersey Act uses those words* * * *." [Emphasis supplied.]

The right thus created by the New Jersey statute may be enforced in a court of admiralty, for it is certainly "not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." Just v. Chambers, 312 U. S. at page 388.

In Lee v. Pure Oil Co., 218 F. 2d 711 (C. A. 6, 1955), it was held that an action for unseaworthiness would not lie pursuant to the Tennessee wrongful death act. It must be noted, however, that the Sixth Circuit commented that the Tennessee Act allowed recovery only for negligence.

To the extent that Graham v. A. Lusi, Limited, 206 F. 2d 223 (C. A. 5, 1953), and Mortenson v. Pacific Far East Lines, Inc., 148 F. Supp. 71 (N. D. Cal. 1956) express views on similar statutes of other states contrary to those expressed in this opinion, we are in disagreement with them.

As to the negligence question, the holding of the district court that no duty devolved upon the vessel *Tungus* to clean up the oil spilled was predicated upon a finding of fact that the operation of repairing the pump was conducted by El Dorado, and that no evidence indicated that *Tungus* personnel either supervised or controlled the discharge of the oil.

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[2] The disposition by the majority rendered a decision on this issue unnecessary.

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While it may be true that El Dorado supervised the pump repair operation, this would hardly lessen the duty of the vessel to provide a reasonably safe place to work, especially since El Dorado's supervision was not so complete as to exclude crew members from the area. In fact, it was the crew which first discovered the oil leakage and adopted temporary measures to stop it. The chief officer of the *Tungus* testified that it was the custom to offer the assistance of ship personnel to independent contractors unloading the vessel. The personnel of the *Tungus* were well aware of the existence of the oil spill and the danger created by it.

The assimilation by Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946) of longshoremen to the position of seamen so far as unseaworthiness is concerned did not take away from the longshoreman his accustomed right to recovery on the theory of negligence. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 413-414 (1953). Engaged in the work of unloading the ship, Skovgaard was a business invitee. See concurring opinion of Justice Frankfurter in Pope & Talbot, Inc. v. Hawn, supra at page 416; see also Santamaria v. Longport & Holt Line, 119 N. J. L. 467, 196 Atl. 706 (Err. & App. 1938). It is relevant to note at this point that Skovgaard was called for the purpose of repairing the pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the deck and tank and not by the instrumentality he intended to repair. Cf. Broecker v. Armstrong Cork Co., 128 N. J. L. 3, 24 A. 2d 194 (Err. & App. 1942).

The duty of providing Skovgaard with a reasonably safe place to work, Hawn v. Pope & Talbot, Inc., 198 F. 2d 800, 803 (C. A. 3, 1952), affirmed, 346 U. S. 406 (1953), would not be lessened even if there were a concurrent duty on the part of Skovgaard's employer. Feinman v. A. H. Bull Steamship Co., 216 F. 2d 393 (C. A. 3, 1954).

While the New Jersey wrongful death statute adopts the maritime standard of care, it is silent as to available

defenses. It is not for us in the first instance, however, but rather for the trier of fact, to determine whether the vessel's duty was breached and to decide factually what defenses, if any, might be available to the respondent. The question of the unseaworthiness of the vessel is likewise one which should be determined initially by the district court.

The judgment of the district court dismissing the libel will be reversed, and the cause will be remanded for further proceedings in conformity with this opinion. The judgment of the district court also dismissed the inpleading petition as a consequence of the dismissal of the libel. This will also be reversed inasmuch as the liability of the impleaded defendant cannot be determined until there has been a full and adequate development of the facts.

HASTIE, *Circuit Judge*, with whom MARIS and KALODNER, *Circuit Judges* join, dissenting.

In one aspect the present libel pictures the shipboard death of libellant's decedent within the state of New Jersey as having resulted, without negligence on the part of the respondent shipowner, from an unseaworthy condition of the vessel. This court now holds that New Jersey, in its Wrongful Death Act, has made a non negligent shipowner liable for death thus caused within the borders of that state. We think this is a mistaken interpretation of the New Jersey law and, therefore, dissent.

The division of the court on this point seems best explained by starting with certain premises and underlying concepts upon which all of us agree. A federal court is here asked to enforce a cause of action, the existence and dimensions of which are determined solely by the law and policy of New Jersey. True, the United States District Court which heard this case was sitting "in admiralty". But for

present purposes this is significant only in that the practice properly followed in that forum is admiralty practice. Thus, the proper form of complaint in this case was a libel in the admiralty style. The shipowners could be reached by attaching the vessel in the classic admiralty manner. But beyond such matters of legal administration, the substantive concepts of admiralty had no effect as law in defining the claim. State law and it alone performed that function. Admiralty was merely the administering forum in a situation in which the maritime law itself did not even provide a cause of action for wrongful death.

The Supreme Court has recently made an explicit and authoritative statement of what a district court does in a situation like this:

> "The United States District Court for the Eastern District of Kentucky heard this suit sitting in admiralty. . . . The District Court adopted and enforced the *obligatio* created by the State of Kentucky not because it sits in Kentucky and responds to the desirability of uniformity in the administration of justice within that State. In the absence of congressional action, the court adopted and enforced the *obligatio* created by Kentucky as it would one originating in any foreign jurisdiction. . . . And it was bound to enforce it as it found it, . . . [except for] procedural niceties. . . ."[1]

For present purposes the most important part of this exposition is the concluding sentence: "it [the federal admiralty court] was bound to enforce it [the state *obligatio*] as it found it. . . ."

Thus, to the extent that state policy has led the state legislature to give dependents rights against one who has caused the death of their provider within the state, a

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[1] *Levinson* v. *Deupree*, 1952, 345 U. S. 648, 651-2. And see the similar rationalization of Circuit Judge, now Chief Judge, Biggs in Klingseisen v. Constanzo Transp. Co., 3d Cir. 1939, 101 F. 2d 902, 903.

federal court will carry out that policy. Ordinarily the federal court entertains the state created wrongful death claim on its law side. But where the fatal injury has occurred on navigable water, it is accepted practice to entertain the suit on the admiralty side. But, in either event, it is the state law, as defined and construed in the light of state policy, which the federal court must apply.

It is believed that all members of this court accept the above outlined legal theory of what a federal court does and how it should approach its task in a case like this. However, we who dissent think the majority has disposed of this case as if admiralty policies and concepts developed by federal courts in maritime causes were controlling when there is nothing to show that New Jersey has adopted or would adopt these federal maritime concepts of liability to define rights it has created as part of its common law jurisprudence.

The New Jersey Wrongful Death Act, like most prototypes of Lord Campbell's Act, gives dependents a right to recover for death caused by the "wrongful act, neglect or default" of another. Historically, neither the common law nor any statute of New Jersey seems ever to have utilized the circumstances of unseaworthiness as a basis of imposed liability for non-negligent personal injury. To reach this court's result it is necessary to attribute to New Jersey a purpose to make a novel piecemeal borrowing of maritime concepts.

We call this borrowing novel and piecemeal advisedly. It has long been a peculiar and characteristic feature of admiralty law that a ship is responsible to indemnify members of its company for injuries caused by the unseaworthiness of the vessel.[2] But historically this responsibility covered only the members of the crew.[3] Moreover, a crewman's rights did not survive him. It is only in recent years,

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[2] *The Osceola*, 1903, 189 U. S. 158.

[3] See Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 1954, 39 Corn. L. Q. 381, 408.

long since the enactment of the New Jersey Wrongful Death Act, that admiralty case law of the United States courts has extended the seaman's protection against unseaworthiness to longshoremen and other persons not members of the crew.[4] Thus, to construe the New Jersey statute as applicable to the present case, requires not only the inference that the New Jersey statute was intended to create rights in accordance with admiralty concepts of liability as they existed when the legislation was passed, but also that subsequent modifications of admiralty concepts by the federal courts routinely become a part of New Jersey policy and law.

Moreover, although the majority do not face the problem here, the question must arise whether under the prevailing analysis New Jersey accepts the unseaworthiness concept alone in defining the statutory rights it has created, or whether other admiralty doctrines, notably that of comparative negligence, are also part of the state created right. This court and others have from time to time rejected the idea that state wrongful death causes incorporate the admiralty comparative negligence concept.[5] If the fact that comparative negligence is a liability defining concept peculiar to maritime law prevents its implied incorporation in a state created death cause, the same seems equally true of the maritime unseaworthiness concept.

Thus, even if the New Jersey cases provided no guide for the interpretation of the Wrongful Death Act in situations of this kind the conclusion reached by the majority would seem illogical and for that reason unwarranted. We

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[4] *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85 (longshoreman); *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U. S. 406 (carpenter working on a ship).

[5] *Curtis* v. *A. Garcia Y Cia., Ltda.*, 3d Cir., 1957, 241 F. 2d 30; *Klingseisen* v. *Costanzo Transp. Co.*, 3d Cir., 1939, 101 F. 2d 902; *Byrd* v. *Napoleon Ave. Ferry Co.*, D. C. E. D. La., 1954, 125 F. Supp. 573, *aff'd per curiam*, 5th Cir., 1955, 227 F. 2d 958, *cert. denied*, 351 U. S. 925; *Feige* v. *Hurley*, 6th Cir., 1937, 89 F. 2d 575.

are the more confident of this view since several federal and state courts interpreting death statutes of other states have been unable to find therein any satisfactory rationale for the use of the unseaworthiness concept in defining the causes of action which these state statutes have created.[6]

But we think the New Jersey cases are instructive and helpful. They show rather clearly the way in which the New Jersey courts understand their wrongful Death Act. As a general proposition, common-law concepts of tort, with negligence a prerequisite to recovery, are read into the New Jersey statute by the courts of that state. If a fatal accident occurs on land or non-navigable water within New Jersey, or if anyone other than the shipowner is sued for a fatal accident on a ship in navigable New Jersey water, there is no question that New Jersey policy and law require a showing of lack of due care to establish a claim under the Wrongful Death Act.[7] It would be strange for New Jersey to rule that under the general wording of the statute, there is a different and more stringent duty on shipowners in navigable water. At least two cases indicate the absence of any such special onerous responsibility on shipowners.

In *Santamaria* v. *Lamport & Holt Line, Ltd.*, E. & A. 1938, 119 N. J. L. 467, 196 Atl. 706, an action under the New Jersey Wrongful Death Act, a shipowner was sued for the death of a stevedore who, while unloading a vessel, was thrown into the hold by the upending of a board constituting part of a hatch cover. In *Moran* v. *Moore-McCormack Lines*, 1944, 131 N. J. L. 332, 35 A. 2d 415, a personal injury case, one line of proof indicated that a stevedore's injury

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[6] *Lee* v. *Pure Oil Co.*, 6th Cir., 1955, 218 F. 2d 711; *Graham* v. *A. Lusi, Ltd.*, 5th Cir., 1953, 206 F. 2d 223; *Mortenson* v. *Pacific Far East Lines, Inc.*, D. C. N. D. Cal., 1956, 148 F. Supp. 71; *Babin* v. *Lykes Bros. S. S. Co.*, 94 So. 2d 715 (La. 1957).

[7] *E.g.*, *Stewart* v. *Norton*, 1951, 6 N. J. 591, 80 A. 2d 111; *DeCicco* v. *Marlou Holding Co.*, E. & A. 1948, 137 N. J. L. 186, 59 A. 2d 227.

had been caused by a latent defect in a skid which the shipowner had provided for the unloading and transferring of cargo. In both cases the New Jersey courts emphasized the absence of liability unless negligence on the part of the shipowner should be proved. True, there was no discussion of the unseaworthiness of vessel or gear as a possible basis of liability without fault. Still if the substantive law of New Jersey as applicable to wrongful death causes recognizes an absolute duty of a shipowner to supply a longshoreman with a seaworthy vessel and gear, it is very difficult to believe that neither court nor counsel would advert to this legal basis of liability in cases so obviously appropriate for its invocation. It should be added that we have found no mention of this possibility in any other New Jersey case.

We think it clear that in administering their Wrongful Death Act, whether the injury has been on land or water and whether the defendant has been a shipowner or anyone else, the New Jersey courts have consistently defined and confined liability within common law concepts of negligent or intentional wrong. For a federal court to say now that the law of New Jersey is otherwise is to rule in derogation of the whole history of New Jersey litigation interpreting a New Jersey statute as based on common law concepts.

Finding no New Jersey cases helpful, the majority point to decisions of several other state courts holding that death caused by breach of warranty of quality of goods may be actionable under their death statutes.[8] But these cases illustrate the very point we are stressing in dissent. In these states there are statutes or decisions, or both, clearly showing the state policy and legal rule making such adulteration of foods an actionable wrong. It then is logical to view death caused by such violation of state policy and re-

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[8] *Greco* v. *S. S. Kresge Co.*, 1938, 277 N. Y. 26, 12 N. E. 2d 557, and see cases collected in 115 A. L. R. 1020.

quirements as actionable under the local Wrongful Death Act. It is the absence of any such New Jersey concept of unseaworthiness as an actionable wrong which requires an opposite result in this case.

Finally, the majority find support for their view in the fact that the New Jersey statute in terms comprehends fatal injury "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury." This provision is present in almost all death statutes of this type and has been universally considered to be a limiting concept. See PROSSER, TORTS, § 105 (2d ed. 1955). The liability defining part of the statute is found in the words "wrongful act, neglect or default". The limiting words which follow serve only to make sure that defenses which would have been available against the decedent, had he lived, shall be available against the wrongful death claim. We think these limiting words have no bearing upon our present problem whether a maritime type of liability without fault is created by the preceding phrase, "wrongful act, neglect or default".

For the foregoing reasons we think the New Jersey law provides no cause of action for death resulting from unseaworthiness without negligence. Judge Maris and Judge Kalodner would go farther and say that the result of the majority would be incorrect even if New Jersey did incorporate the unseaworthiness concept of admiralty. In this case the district court found as a fact that the decedent knew of the presence of the oil slick which caused him to slip and fall to his death. Indeed, the record shows beyond question that this condition was apparent and obvious. In addition, decedent boarded the ship to repair the very defective valve which had caused the oil to leak and spread over the deck. In these circumstances Judge Maris and Judge Kalodner would hold, relying upon *Bruszewski* v. *Isthmian SS Co.*, 3d Cir., 1947, 163 F. 2d 270, cert. denied 333 U. S. 828, that, even applying concepts of the maritime

law, a shipowner does not warrant, to one so situated and informed as this workman, that the deck is free of oil or of the obvious hazards incidental to the presence of that substance. However, I am content to rest my dissent solely upon the construction and application of the New Jersey law, without examining the reach of the unseaworthiness doctrine, if maritime law were applicable.

This case has a second aspect. The libellant undertook to prove that, quite apart from unseaworthiness, the shipowner was responsible for actionable negligence on the part of the ship's personnel in not providing the decedent with a reasonably safe place to work. On the evidence and the findings we think the defendant was entitled to judgment on this branch of the case.

Here again the majority seem to apply federal admiralty concepts to define a state created death claim. But the question to be decided is the extent of the duty which New Jersey law imposes upon the possessor of a place to provide a safe place to work for employees of independent contractors who entered the place as business invitees. The fact that the place in this case is a ship is incidental and irrelevant for present purposes.

We have already pointed out that in this case it has been established as a fact that the dangerous condition was obvious and actually known to the decedent. In *Newbury* v. *American Stores Co.*, 1935, 115 N. J. L. 604, 607, 180 Atl. 875, 876, the Court of Errors and Appeals stated the rule of New Jersey law which is controlling in such circumstances: "It is axiomatic that the rule that one who enters store premises by invitation may lawfully assume that the proprietor has performed his duty to render the premises reasonably safe, is not applicable where the invitee knows the contrary to be the case." We think *Broeker* v. *Armstrong Cork Co.*, E. & A. 1942, 128 N. J. L. 3, 24 A. 2d 194, turns on the same principle that a danger which is obvious to the business visitor does not constitute a breach of duty

to provide him with a safe place to work. Indeed, this appears to be a principle which is generally accepted in the law of torts.[9]

In these circumstances it is immaterial whether admiralty law, in cases to which it is applicable, may impose a more stringent duty. New Jersey tort principles are controlling here, and under them, on the admitted facts, the person in possession of the place of injury was not responsible for death caused by a condition of which the invitee was fully cognizant.

In our view the judgment below should be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

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[9] TORTS, RESTATEMENT, §§ 340, 343; *Ambrose* v. *Moffat Coal Co.*, 1948, 358 Pa. 465, 58 A. 2d 20. *McCreerey* v. *Westmoreland Farm Bureau Co-Operative Ass'n.*, 1947, 356 Pa. 567, 55 A. 2d 399.

Appendix B

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 12,025 and 12,031

OLGA SKOVGAARD, Administratrix ad prosequendum of the Estate of Carl E. Skovgaard, deceased; and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Appellant in No. 12025,

VS.

The Vessel "M/V TUNGUS", her boilers, engines, tackle, apparel and furniture,

and

DEN NORSKE AFRIKA-OG AUSTRALIELINIE WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI,

Appellants in No. 12,031,

and

BARBER STEAMSHIP LINES, INC.,

and

ELDORADO OIL WORKS.

On appeal from the United States District Court for the District of New Jersey

Appendix B

Present:

BIGGS, Chief Judge, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case dismissing the libel and the impleading petition be, and the same is hereby reversed, with costs, and the cause remanded for further proceedings in conformity with the opinion of this Court.

Attest:

IDA O. CRESKOFF,
Clerk.

December 23, 1957

Appendix C

(Opinion of Hand, C. J.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—October Term, 1957

(Argued November 21, 1957 Decided January 10, 1958)

Docket No. 24551

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Appellee,

v.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Appellants.

Before:

HAND, HINCKS, and LUMBARD,

Circuit Judges.

Appeal by the defendants from a judgment of the District Court for the Southern District of New York in favor of the plaintiff in an action to recover damages for the death of the decedent in the State of New Jersey because of the negligence of the defendants and of the unseaworthiness of a pilot boat on which he was employed. Affirmed.

LAWRENCE J. MAHONEY for the appellants.

NATHAN BAKER for the appellee.

Appendix C

HAND, *Circuit Judge*:

This appeal is from a judgment for the plaintiff entered on the verdict of a jury, awarding damages for the death of the plaintiff's decedent while engaged in cleaning the pilot boat, "New Jersey," belonging to the defendants. The complaint was based upon two counts; one for negligence and the other for unseaworthiness, and four errors are alleged. First, that the evidence was not sufficient to justify a verdict on either count. Second, that the court erred in submitting to the jury any question of seaworthiness. Third, that the court should have charged the jury under the New Jersey Death Statute contributory negligence was a bar and not a limitation upon damages. Fourth, that the defendants should have been allowed to show that the plaintiff had made inconsistent allegations in another and pending litigation.

On September 22, 1951, the "New Jersey," a pilot boat, was moored at a pier in the repairyard of Rodermond Industries, Inc., North River, Jersey City, for annual overhaul and repairs; the only employee of the defendants on board was a watchman. Part of the work was to clean the ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will "remove all traces of dirt and film," but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore.

One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The "blower" was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and "vents" at the top of the engine-room through which air was drawn in. Thus, means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the "blower," and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and the deceased was not "adequate to remove the fumes." The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision.[1] The state law of evidence is no longer the final test of the admissibility of evidence.

As we have said the case was left to the jury in a double aspect: (1) whether the defendants had been negligent in furnishing the deceased as a "business guest" with an unfit place to work, and (2) whether the ship was unseaworthy vis-a-vis a shore worker who came aboard to take part in the annual overhaul. It is obvious therefore that the plaintiff's evidence had to support a verdict on both claims; for we cannot know that the unsupported claim was not the one

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[1] *United States* v. *Miller*, 61 F. 2d 949, 950 (C. A. 2); *Tucker* v. *Loew's Theatre & Realty Co.*, 149 F. 2d 677, 679 (C. A. 2); *Trowbridge* v. *Abrasive Co.*, 190 F. 2d 825, 829 (C. A. 3); 2 Wigmore, § 561.

on which alone they brought in their verdict. As to the claim based on negligence, so far as the defendants mean to argue that the engine-room, equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict. The deceased was certainly an "invited person," or "business guest," and the shipowner was liable, not only for the negligence of the master,[2] but, although the work was let out to a subcontractor, also for any lack of "reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities."[3] Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the "methods and manner" of its use were proper. So much for the negligence count.

Quite a different question arises as to the warranty of seaworthiness, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. Although in a very scholarly analysis of the earlier decisions, it has been recently argued that the maritime law did not impose such a warranty in favor of seamen,[4] rightly or wrongly the opposite doctrine has become so firmly settled since *The Osceola*, 189 U. S. 158 (1902) that we decline to reconsider the question. All that is left for us on this appeal is whether the warranty of seaworthiness extended to the decedent although concededly he was not a seaman, but as we have said, a "business guest" on a vessel

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[2] *Leathers* v. *Blessing*, 105 U. S. 626, 630

[3] Restatement of Torts, Vol. II, § 344, Comment b.

[4] "Seamen, Seaworthiness and the Rights of Harbor Workers," Francis L. Tetrault, 39 Cornell Law Quarterly, 381.

within the navigable waters of New Jersey. In *Guerrini* v. *United States,* 167 F. 2d 352 (C. A. 2), the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, did not apply. However, that was in 1948 before either *Pope & Talbot* v. *Hawn,* 346 U. S. 406 or *Petterson* v. *Alaska SS. Co.,* 347 U. S. 396, was decided; it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of "control" of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot* v. *Hawn, supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot* v. *Hawn, supra.*

As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in *Read* v. *United States,* 201 F. 2d 758, the Third Circuit held that the warranty extended to a "business guest" who was doing part of the work of changing a "Liberty" ship into a transport, while the Ninth Circuit in *Berryhill* v. *Pacific Far East Line,* 238 F. 2d 385, cert. den. 354 U. S. 938, refused relief to a workman who was engaged in "major repairs," as these were described in the District Court (138 Fed. Supp. 859). In the appeal in *Berge* v. *National Bulk Carriers, Inc.* (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not

necessary to pass on that question here, because as we have said, the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul. We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness.

That does not however answer two other objections: (1) that the plaintiff is not the decedent, but an administratrix, and (2) that the judge left the decedent's contributory negligence to the jury, not as a bar, but only in limitation of damages. It is common ground that the liability for breach of the warranty of unseaworthiness does not survive under the maritime law (*The Harrisburg,* 119 U. S. 199; *Lindgren* v. *United States,* 281 U. S. 38). As to the maritime tort, §33 of the Merchant Marine Act of 1920 (Title 46, § 688) gave to "the personal representatives" of a deceased seaman the same remedies that the deceased would have had, had he lived. However, in the case at bar the deceased was not a seaman, so that upon both counts the plaintiff must resort to the "Lord Campbell's Act" of New Jersey [5] which provides in general terms: "When the death of a person is caused by a wrongful act, neglect or default such as would * * * have entitled the person injured to maintain an action for damages * * * the person who would have been liable * * * shall be liable in an action for damages." Much controversy has arisen over the scope of the phrase just quoted, making the liability to the next of kin depend upon an "act, neglect or default" of the putative obligor. When the question arose in the Third Circuit whether these words covered a breach of the warranty of seaworthiness, the court *in banco* by a vote of four to three held (*Skovgaard* v. *The Tungus,* December 23, 1957) that they did. In spite of the zeal with which the

[5] N. J. S. A. 2A:31-1.

contrary has been argued, we think that the majority was right. *Graham* v. *Lusi*, 206 F. 2d 223 (C. A. 5) does not actually hold the contrary; though that may have been the court's opinion. Its decision was based solely on the point of contributory negligence, and did not pass upon the ruling of the district court that the libel could not rest on breach of warranty. *Lee* v. *Pure Oil Co.*, 218 F. 2d 711 (C. A. 5) held that, even vis-a-vis the deceased, there was no breach of warranty, and then went on to say that in any event his administratrix would not recover. The report does not tell us what was the language of the Tennessee statute; but if it was the same as that of New Jersey, we are not persuaded. We hold that "neglect" and "default" both cover a breach of the warranty.

There remains, however, the further question: *i.e.*, whether contributory negligence is an absolute defense. Before the decision of the Supreme Court in *Pope & Talbot* v. *Hawn, supra*, it had been generally held that when a seaman before the Merchant Marine Act of 1920, or a shoreworker thereafter, had been killed because of the negligence of the ship's crew in the navigable waters of a state having a local Lord Campbell's Act, contributory negligence was a bar to an action by his next of kin. This was as true when the suit was in the admiralty as in a court of the state; in short, the bar arising from contributory negligence was an incident of the liability imposed by the state, no matter where suit upon it was brought.[6] In *Pope & Talbot* v. *Hawn, supra*, however, the Court held that contributory negligence was not a bar to an action at law by

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[6] *Robinson* v. *Detroit V. C. Steam Navigation Co.*, 73 F. 883 (6th Cir. 1896); *Quinette* v. *Bisso*, 136 F. 825 (5th Cir. 1905); *O'Brien* v. *Luckenbach S. S. Co.*, 293 F. 170 (2d Cir. 1923); *Klingseisen* v. *Costanzo Transp Co.*, 101 F. 2d 902 (3d Cir. 1939); *Graham* v. *A. Lusi*, 206 F. 2d 233 (5th Cir. 1953); *The A. W. Thompson*, 39 F. 115 (S. D. N. Y. 1889 per Addison Brown, J.); *The James M'Gee* 300 F. 93 (S. D. N. Y. 1924).

a "business guest," but only limited his damages, and this we read to mean that rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence whether suit upon it is in the admiralty or in an action at law, state or federal.[7] The following language we take from the opinion of the majority in that case, pages 409, 410: "the right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of congress, or interpretative opinions of this Court." Although, as we have said, we are not dealing with "federal maritime law," we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights "rooted in federal maritime law" as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. Although it was only a dictum, the First Circuit in *O'Leary* v. *United States Lines Company*, 215 F. 2d 708, 711, declared that "it would be incongruous to hold in conformity with Pope & Talbot v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death." We are aware that *Curtis* v. *Garcia*, 241 F. 2d 30, 36 (C. A. 3) is to the contrary, but as neither it nor *O'Leary* v.

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[7] Cf. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239.

United States Lines Company, supra, is authoritative, we are free to choose. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar.

Finally, the defendants complain that the judge refused to allow them to prove that the plaintiff in another action had asserted that Rodermond Industries had control of the vessel. Even though this were an error—on which we do not pass—obviously it was not of enough importance to reverse the judgment.

Judgment affirmed.

LUMBARD, *Circuit Judge* (dissenting):

I cannot agree that we must subscribe to the principle that a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform. It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

A summary of the evidence showing how the generators were cleaned by spraying with carbon tetrachloride shows the absurdity of assimilating this work to that of a seaman or of saying that the work "is of a kind that traditionally the crew has been accustomed to do."

On Saturday, September 22, 1951 the pilot boat "New Jersey," owned by the appellants was turned over to Rod-

ermond Industries, Inc. for its annual overhaul and inspection. It was moored at the Rodermond repair yard pier at the foot of Henderson Street, North River, Jersey City, New Jersey. A list of repairs, prepared by Rodermond the following Monday, September 24 provided that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and the contractor was to do some work on the cylinder heads. Under the same heading "Port & Star Generators" it was provided:

> "Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order."

Rodermond in turn subcontracted with Halecki's employer, the K & S Electrical Company, to do certain electrical work and to spray the generators with carbon tetrachloride, since neither ship nor shipyard was equipped or competent to do this work. The K & S foreman, Donald Doidge, was at work on the New Jersey from Monday, September 24, and on that day he consulted with the New Jersey's chief engineer as to when the spraying should be done as "we know it has to be done when there is nobody else on board ship." Doidge agreed with the chief engineer that it should be done on Saturday during the absence of the crew, since during the week members of the crew were working on the ship.

Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the Saturday spraying. Doidge, the shop foreman, had been an electrician for about 25 years and Halecki had worked with him for about 6 years. Not all their work was on ships; they cleaned generators by carbon tetrachloride spray in factories and buildings, wherever the generators were. On Friday they brought on board extra air hoses and a blower belonging to Rodermond. One air hose was used for the spray gun and the other was used underneath the generator as an exhaust to blow the fumes away from the man spraying. A high

compression "blower" was placed so that it would exhaust foul air through one of the two open doorways.

On Saturday morning, September 29, according to the previous arrangement, Doidge and Halecki came aboard to do the spraying. They found only the defendant's watchman, Walter C. Thompson, and they told him to stay out of the engineroom and not to let anybody down. They brought with them three gas masks belonging to K & S Electric Company. Halecki wore a gas mask and did most of the spraying 10 to 15 minutes at a time with intervening rest periods of equal length. All the equipment for exhausting the fumes and the ship's ventilating system were in operation and run by power supplied from generators on shore. Halecki took sick the next day and died two weeks later. There was sufficient evidence to support the jury's finding that death was caused by carbon tetrachloride poisoning.

Despite history and logic, the trend of decisions in cases involving injuries and death on navigable waters, now further extended by my distinguished colleagues, seems to be guided by what Justice Rutledge has frankly called a "humanitarian policy." *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). This policy seems to be based on the theory that judges are competent to determine that it is better that the shipowners should assume all the burdens because they are able to average them out through insurance or some form of protection against all the hazards of accident which may occur on shipboard to anyone coming on board. The result has been a progressive expansion, both qualitative and quantitative, in the duties and liabilities imposed upon shipowners.[1] From a concept resting

[1] See Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381 (1954); The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale L. J. 243, 252 (1947); Gilmore and Black, The Law of Admiralty, 315-324, 358 (1957).

on negligence, seaworthiness has, by judicial development, become an absolute duty imposing liability without fault. From a duty running to those we traditionally consider as seamen, exposed to the hazards and discipline of the sea, it has been expanded to include a multitude of harbor workers who report for work in the morning and return to their homes at night. The burdens of proving lack of due care and of defending against the bar of contributory negligence are jettisoned by this judicial legislation. Where there is the slightest support for causation the only question for the jury is the amount of damages.

It may be argued that the initiative taken by the federal courts in imposing absolute liability is justified by their peculiar historical responsibility for admiralty law. And we are told that certain harbor workers come within the ambit of the warranty of seaworthiness because a shipowner cannot escape liability by delegating to others what is traditionally seamen's work. *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). Here we go further. When a lower court charges on both seaworthiness and negligence toward a business invitee, we must assume that the only justification for the charge on seaworthiness is that the shipowner may be found liable despite his own due care. By assimilating certain activities to maritime law, we extend the absolute liability of shipowners, in effect, beyond the shipyard gates. The owner, despite the utmost care, is liable for the activities of a specialist employed expressly because these activities were beyond the range of experience and competence of the ship's crew. These circumstances rebut the contention that the shipowner is nullifying his liability by parcelling out ship's work to others.

The anomaly of the result reached here is pointed up when we consider the restricted liability of the specialist's employer, who is in the most favorable position to reduce the incidence of injury. Unlike the shipowner, the immediate employer's liability is restricted to the insurance ex-

penses of workmen's compensation or to damages incurred due to his lack of due care. Although the shipowner was not Halecki's employer and this was essentially an industrial injury resulting in the death of a shore-based electrician, an absolute liability of judicial creation is imposed upon the shipowner above and beyond the system developed by New Jersey to compensate for industrial accidents. I had thought that such far-reaching changes in rights and legal duties were solely within the province of the elected representatives of the people in Congress and not the proper business of judges. The traditional responsibility of the federal judiciary for admiralty does not justify such an expansion of liability.

Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September while the ship was made fast to a bulkhead in Jersey City. He was not a seaman, he was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they do not apply to those employed to do a special job of such a dangerous and unusual nature that it is beyond the competence of ship and shipyard, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the safe performance of the hazardous activity.

The case of *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1956) cert. den. 354 U. S. 938, is authority for the proposition that when the manner of doing the work is foreign to what the ship's crew could do and involves the use of equipment not used or known on ships, there is no warranty of seaworthiness running to those who are injured in the course of doing such work by reason of any defect in the equipment so used. In that case the plaintiff was injured by the shattering of a grinding wheel brought

on board by his employer, Todd Shipyards Corporation, for use in repairs being made on the "shaft keyway" on defendant's ship. The Court of Appeals held there was no warranty of seaworthiness with respect to the grinding wheel. Judge Barnes pointed out that to hold otherwise would go beyond the *Sieracki, Hawn* and *Petterson*[2] cases as the grinding wheel was equipment that the ship could do without, and the shipowner may never have had any reason to know that such equipment existed. That the kind of equipment used is foreign to the vessel is just another way of saying that the work done is not the kind of work normally done by seamen.

My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is the kind of work which seamen would normally do, cleaning a generator is seamen's work and those who do it are entitled to a warranty of seaworthiness. This assimilates spraying with carbon tetrachloride to all cleaning as if it were harmless and commonplace; it is a play on words which by a characterization avoids dealing with a difference in means which completely destroys the validity of the syllogism. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman.

That such general characterization is not a solution is emphasized by *Berge* v. *National Bulk Carriers Corp.*, decided this day. There the same panel of this court holds unanimously that there is no warranty of seaworthiness

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[2] *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Petterson* v. *Alaska S. S. Co.*, 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954).

to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when the shearing of a defective shackle pin caused a chain tackle to fall and knock him from a scaffold. What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in *Berge*, the work required the cessation of ship's operations and the removal of the crew.

Passing this point, I must also dissent from the majority's view that under the New Jersey Death Statute, N. J. S. 2A:31-1 (1952), a maritime claim, such as Halecki's, is not subject to the defense of contributory negligence. There is no basis for saying that the New Jersey legislature meant to abandon the defense of contributory negligence in such cases and it seems to me there is every reason as a matter of common sense and usual practice for saying that they did not mean these cases to be on a different basis. I would adopt the views of *Curtis* v. *Garcia*, 241 F. 2d 30 (3 Cir. 1957). Furthermore, it is difficult enough for admiralty lawyers and judges to keep up with the changes and developments in this field without expecting the members of a state legislature, few if any of whom are admiralty lawyers, to take over sight unseen whatever may be held to come along in the kaleidoscope of maritime rights, as against the doctrine of contributory negligence with which New Jersey and her lawyers have long been familiar. To hold otherwise seems to me to embrace a pure fiction for the purpose of implementing "humanitarian policy."

To refuse to extend the warranty of seaworthiness to Halecki and incorporate by reference comparative negligence into the New Jersey Death Statute would not leave

persons in the position of Halecki's survivors without a remedy. Besides the remedies against the employer normally incident to death by industrial accident in New Jersey, see R. S. 34:15-1, 34:15-7, 34:15-8, 34:15-9, R. S. Cum. Supp. 34:15-4, such persons apparently may alternatively elect to proceed against decedent's employer under the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A. § 901 *et seq.* See *Davis* v. *Dept. of Labor and Industries of Washington*, 317 U. S. 249 (1942); *Dunleavy* v. *Tietjen & Lang Dry Docks*, 17 N. J. Super. 76, 85 A. 2d 343 (Cty. Ct. 1951), aff'd 20 N. J. Super. 486, 90 A. 2d 84 (App. Div. 1952). Nor does our refusal foreclose actions against the shipowner or the shipyard for their failure to exercise due care. Indeed such an action was brought by this appellee against Rodermond Industries for its alleged negligence in the events which led up to Halecki's death. Moreover our refusal in this action would permit retrial of the cause against the shipowner on the theory of negligence.

I would dismiss so much of the complaint as relies on a warranty of seaworthiness, and reverse and remand for a new trial on the issue of negligence.